

1
2
3
4
5
6
7
8 **UNITED STATES DISTRICT COURT**
9 **CENTRAL DISTRICT OF CALIFORNIA**

10
11 YADIRA CARDENAS,

12 Plaintiff,

13 v.

14 NANCY A. BERRYHILL, Acting
15 Commissioner of Social Security,

16 Defendant.

17 Case No. EDCV17-01525-AFM

18
19 **MEMORANDUM OPINION AND**
20 **ORDER AFFIRMING DECISION**
21 **OF COMMISSIONER**

22 Plaintiff filed this action seeking review of the Commissioner's final decision
23 denying her applications for disability insurance benefits and supplemental security
24 income. In accordance with the Court's case management order, the parties have
25 filed memorandum briefs addressing the merits of the disputed issues.¹ This matter
26 is now ready for decision.

27 **BACKGROUND**

28 Plaintiff filed applications for disability insurance benefits and supplemental
29 security income on July 2, 2013, alleging disability beginning March 1, 2005. Her

30 ¹ Defendant's memorandum was mislabeled as a motion for summary judgment. (ECF
31 No. 19.)

1 applications were denied on initial review and on reconsideration. (Administrative
2 Record [“AR”] 178-198.) A hearing took place before an Administrative Law
3 Judge (“ALJ”) on February 17, 2016. Plaintiff, who was represented by counsel,
4 testified at the hearing, as did a vocational expert (“VE”). The ALJ issued a
5 decision dated March 11, 2016, finding that Plaintiff was not under a disability
6 within the meaning of the Social Security Act (“the Act”) from March 1, 2005
7 through the date of the decision. (AR 63-73.) The Appeals Council subsequently
8 declined review, rendering the ALJ’s decision the final decision of the
9 Commissioner. (AR 1-7.)

10 **DISPUTED ISSUE**

11 Whether the ALJ failed to properly consider Plaintiff’s subjective complaints.

12 **STANDARD OF REVIEW**

13 Under 42 U.S.C. § 405(g), this Court reviews the Commissioner’s decision to
14 determine whether the Commissioner’s findings are supported by substantial
15 evidence and whether the proper legal standards were applied. *See Treichler v.*
16 *Comm’r of Soc. Sec. Admin.*, 775 F.3d 1090, 1098 (9th Cir. 2014). Substantial
17 evidence means “more than a mere scintilla” but less than a preponderance. *See*
18 *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Lingenfelter v. Astrue*, 504 F.3d
19 1028, 1035 (9th Cir. 2007). Substantial evidence is “such relevant evidence as a
20 reasonable mind might accept as adequate to support a conclusion.” *Richardson*,
21 402 U.S. at 401. This Court must review the record as a whole, weighing both the
22 evidence that supports and the evidence that detracts from the Commissioner’s
23 conclusion. *Lingenfelter*, 504 F.3d at 1035. Where evidence is susceptible of more
24 than one rational interpretation, the Commissioner’s decision must be upheld. *See*
25 *Orn v. Astrue*, 495 F.3d 625, 630 (9th Cir. 2007).

26 **THE ALJ’S DECISION**

27 The ALJ found that Plaintiff suffered from severe impairments – namely,
28 lumbar spine degenerative disk disease, diabetes, left lower extremity disorder, and

1 obesity – but that no impairment or combination of impairments met or medically
2 equal the severity of one of the listed impairments. (AR 67-68.) Based upon her
3 review of the record, the ALJ determined that Plaintiff retained the residual
4 functional capacity (“RFC”) to perform sedentary work as defined by 20 C.F.R.
5 404.1567(a) and 416.967(a) except lifting/carrying 20 pounds occasionally and 10
6 pounds frequently; pushing/pulling within the weight limits of lifting/carrying;
7 standing and/or walking for one hour in an eight-hour workday; sitting for eight
8 hours in an eight-hour workday; no ladders, ropes, or scaffolds; no crawling; rarely
9 stairs, bending or crouching; no work hazards such as working at unprotected
10 heights, operating fast or dangerous machinery, or driving commercial vehicles;
11 and requires the use of a cane for any prolonged walks. (AR 69.) Accepting the
12 testimony of the VE, the ALJ determined that given Plaintiff’s RFC, she was
13 capable of performing jobs existing in significant numbers in the national economy.
14 (AR 72.)

DISCUSSION

16 Where, as here, a claimant has produced objective medical evidence of an
17 impairment which could reasonably be expected to produce some degree of pain
18 and/or other symptoms, and the record is devoid of any affirmative evidence of
19 malingering, the ALJ must provide “specific, clear and convincing reasons” for
20 rejecting the claimant’s testimony regarding the severity of pain or other symptoms.
21 *Burrell v. Colvin*, 775 F.3d 1133, 1136 (9th Cir. 2014) (quoting *Molina v. Astrue*,
22 674 F.3d 1104, 1112 (9th Cir. 2012)). “General findings [regarding a claimant’s
23 credibility] are insufficient; rather, the ALJ must identify what testimony is not
24 credible and what evidence undermines the claimant’s complaints.” *Burrell*, 775
25 F.3d at 1138 (quoting *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995)). Further,
26 the ALJ’s findings “must be sufficiently specific to allow a reviewing court to
27 conclude the adjudicator rejected the claimant’s testimony on permissible grounds
28 and did not arbitrarily discredit a claimant’s testimony regarding pain.” *Brown-*

1 *Hunter v. Colvin*, 806 F.3d 487, 493 (9th Cir. 2015) (quoting *Bunnell v. Sullivan*,
2 947 F.2d 345-46 (9th Cir. 1991) (en banc)). An ALJ may consider a variety of
3 factors ordinarily used in assessing credibility, including inconsistencies within the
4 claimant's testimony or between the claimant's testimony and the claimant's
5 conduct, the claimant's work record, and information from physicians, relatives, or
6 friends concerning the nature, severity, and effect of the claimant's symptoms. *See*
7 *Thomas v. Barnhart*, 278 F.3d 947, 958-59 (9th Cir. 2002); *Light v. Social Sec.*
8 *Admin.*, 119 F.3d 789, 792 (9th Cir. 1997); *Fair v. Bowen*, 885 F.2d 597, 604 n.5
9 (9th Cir. 1989). Since the Commissioner has not argued that there was evidence of
10 malingering, the “clear and convincing” standard applies to the ALJ’s adverse
11 credibility determination. *See Burrell*, 775 F.3d at 1136.

12 Plaintiff alleged disability due to symptoms related to diabetes, high blood
13 pressure, leg and back pain, and carpal tunnel syndrome. (AR 121, 335.) At the
14 hearing, Plaintiff testified that she generally used a walker but sometimes used a
15 wheelchair and had done so “off and on” for six years. (AR 116.) She stated that
16 she needed a walker or wheelchair because of stiffness in her left leg. (AR 116.)
17 Plaintiff explained that she previously used a cane, but discontinued approximately
18 three years prior to the hearing because she was too heavy to be supported by a
19 cane. (AR 116-117, 119.) Plaintiff estimated that she could walk using a walker for
20 five minutes before becoming tired; could stand for a period of ten to fifteen
21 minutes before becoming tired; could sit for a period of fifteen minutes before
22 experiencing pain and needing to stand up; could not bend down and kneel; and as
23 of approximately one year before the hearing, she was unable to climb stairs. (AR
24 125-129.)

25 The ALJ provided the following reasons for discounting Plaintiff’s testimony
26 as to the severity of her symptoms: (1) Plaintiff received generally routine and
27 conservative treatment; (2) the objective medical evidence supported the ALJ’s
28 RFC; (3) Plaintiff’s testimony contained inconsistencies; and (4) Plaintiff’s daily

1 activities were inconsistent with the severity of her alleged limitations. (AR 71-72.)

2 **1. Conservative treatment**

3 An ALJ may properly consider a claimant's conservative treatment in
4 assessing the credibility of her subjective complaints. *See Marsh v. Colvin*, 792
5 F.3d 1170, 1173 n.2 (9th Cir. 2015) ("routine or conservative" treatment is a clear
6 and convincing reason for which an ALJ may reject a claimant's testimony about
7 symptom severity); *Parra v. Astrue*, 481 F.3d 742 (9th Cir. 2007) (conservative
8 treatment consisting of over the counter pain medication was sufficient reason to
9 discount a claimant's testimony regarding the severity of their symptoms).

10 Here, the ALJ discounted Plaintiff's allegations regarding the severity of her
11 pain and symptoms in part because the medical record revealed that she received
12 routine and conservative treatment. (AR 71-72.) The ALJ's characterization of
13 Plaintiff's treatment is supported by substantial evidence. As the ALJ accurately
14 noted, Plaintiff's complaints of disabling leg and back pain were treated only with
15 referrals for diagnostic testing – none of which revealed any significant findings –
16 and generally with over-the-counter medication, namely ibuprofen. (AR 71, 418-
17 419, 426, 439-440, 448-453.) Plaintiff points to nothing in the record suggesting
18 that any physician recommended, or petitioner sought, more aggressive treatment,
19 such as narcotic pain medication, steroid injections, or surgery. *See Osenbrock v.*
20 *Apfel*, 240 F.3d 1157, 1166 (9th Cir. 2001) (ALJ properly rejected the claimant's
21 testimony because he did not use "Codeine or Morphine based analgesics that are
22 commonly prescribed for severe and unremitting pain"); *Meanel v. Apfel*, 172 F.3d
23 1111, 1114 (9th Cir. 1999) (a physician's failure "to prescribe ... any serious
24 medical treatment for [a claimant's] supposedly excruciating pain" may be
25 evidence of conservative treatment). Plaintiff points out that she was prescribed
26 gabapentin for her nerve disorder (*see* AR 438, 449), but this medication alone does
27 not alter the conservative nature of her treatment. *See Rodriguez v. Colvin*, 2016
28 WL 552648, at *2 (C.D. Cal. Feb. 10, 2016) (ALJ properly characterized claimant's

1 treatment as conservative and rejected subjective complaints where claimant was
2 prescribed gabapentin and did not rely solely on over-the-counter medication).

3 The ALJ also noted that Plaintiff's blood pressure and carpal tunnel
4 syndrome were managed, and no aggressive treatment was recommended or
5 anticipated for either condition. (AR 68.) With regard to her diabetes, Plaintiff was
6 prescribed Metformin, but she reported that she had stopped taking the medication
7 in 2013. The medical records confirm that Plaintiff's diabetes condition was
8 managed with oral medication. (See AR 71-72, 122, 419, 422, 424, 426, 439-440,
9 446, 448.) *See Warre v. Comm'r of Social Sec. Admin.*, 439 F.3d 1001, 1006 (9th
10 Cir. 2006) ("Impairments that can be controlled effectively with medication are not
11 disabling for the purpose of determining eligibility for SSI benefits.").

12 Plaintiff contends that the ALJ erroneously inferred that over-the-counter
13 medication provided total relief of her symptoms because if that were true, Plaintiff
14 "would presumably not be complaining of [pain] to her provider." (Plaintiff's Mem.
15 at 8.) In support of this argument, Plaintiff points out that notwithstanding the
16 medication, she continued to report back and leg pain, and that on one occasion she
17 reported burning pain, numbness, and tingling in her legs. (Plaintiff's Mem. at 7-8
18 (citing AR 448, 451-452).) Plaintiff's argument is unpersuasive. The reports on
19 which Plaintiff relies merely reflect her subjective complaints of pain, and so they
20 beg the question. The fact that Plaintiff reported experiencing pain does not
21 undermine the ALJ's conclusion that Plaintiff's physicians did not recommend or
22 prescribe anything more than conservative treatment for her complaints.²
23 Accordingly, the ALJ properly relied upon Plaintiff's conservative treatment to
24 discredit her subjective complaints. *See Tommasetti v. Astrue*, 533 F.3d 1035, 1040
25 (9th Cir. 2008) (ALJ properly considered the claimant's use of "conservative

27 ² It is also noteworthy that the report Plaintiff cites as evidence of her complaint of
28 burning pain also includes Plaintiff's acknowledgement that "[t]he pain is relieved by
OTC medicines (ibuprofen)." (AR 451.)

1 treatment including physical therapy and the use of anti-inflammatory medication, a
2 transcutaneous electrical nerve stimulation unit, and a lumbosacral corset”).

3 **2. Lack of objective medical evidence**

4 “Although lack of medical evidence cannot form the sole basis for
5 discounting pain testimony, it is a factor that the ALJ can consider in his credibility
6 analysis.” *Burch v. Barnhart*, 400 F.3d 676, 681 (9th Cir. 2005); *see Batson v.*
7 *Comm'r of Soc. Sec. Admin.*, 359 F.3d 1190, 1197 (9th Cir. 2004) (lack of objective
8 medical evidence to support claimant’s subjective complaints constitutes substantial
9 evidence in support of an ALJ’s adverse credibility determination).

10 Here, the ALJ accurately summarized the objective medical evidence and
11 concluded that it did not support the severity of Plaintiff’s allegations. (AR 71.) In
12 particular, the ALJ noted during an examination in August 2015, Plaintiff exhibited
13 left foot and ankle swelling, non-pitting edema and painful range of motion, but
14 otherwise her physical examination was unremarkable. (AR 71, 454.) During that
15 examination, Plaintiff indicated that her pain was relieved with over-the-counter
16 ibuprofen. (AR 451.) Plaintiff’s December 1, 2015 physical examination revealed
17 edema in the left calf, severity 2+ and pitting type, but otherwise her physical
18 examination was unremarkable. (AR 71, 446-450.) Physical examination on
19 December 30, 2015 revealed mild swelling and stiffness in the left leg, tenderness
20 in the low back, shoulder, and ankle. Otherwise, the physical examination was
21 unremarkable. (AR 417-418.) Plaintiff was prescribed Metformin, lisinopril and
22 ibuprofen. (AR 418, 424, 426.)

23 The ALJ also noted that Plaintiff’s diagnostic tests showed minimal, if any,
24 findings. Specifically, Plaintiff’s 2013 lumbar spine images showed mild to
25 moderate degenerative disc disease from L1 to L3 and mild degenerative disease at
26 L5-S1 (AR 71, 416); September 2015 images of Plaintiff’s lumbar spine showed
27 moderate degenerative disc disease, most notably at L2-L3 (AR 71, 442); a
28 September 2015 X-ray of Plaintiff’s ankle showed a “tiny calcaneal spur” (AR 71,

1 441); X-rays of Plaintiff's left knee from the same date were unremarkable (AR 71,
2 443); and a February 2016 ultrasound of Plaintiff's legs revealed no evidence of
3 deep venous thrombosis bilaterally (AR 71, 444).

4 As the ALJ noted, Plaintiff had surgery for carpal tunnel syndrome in 2002
5 and nothing in the medical records suggesting that additional treatment was either
6 anticipated or recommended. (*See* AR 68, 70, 82, 100, 122, 127, 435.) In addition,
7 the ALJ noted that Plaintiff's high blood pressure and diabetes were effectively
8 treated with medication, and her diabetes was noted to be without complication.
9 (AR 68, 71-72, 439, 446.)

10 In light of the foregoing record, the ALJ properly relied upon the absence of
11 objective medical support as one factor in her decision to discount Plaintiff's
12 subjective complaints.

13 **3. Inconsistencies in Plaintiff's testimony**

14 An ALJ may use ordinary techniques of credibility evaluation, such as the
15 claimant's prior inconsistent statements concerning the symptoms, and other
16 testimony by the claimant that appears less than candid. *See Molina*, 674 F.3d at
17 1112; *Tommasetti*, 533 F.3d at 1039. If the ALJ's finding is supported by
18 substantial evidence, the Court "may not engage in second-guessing." *Thomas*, 278
19 F.3d at 959.

20 Here, in assessing the credibility of Plaintiff's subjective complaints, the ALJ
21 considered what she found to be inconsistencies in Plaintiff's testimony. In
22 particular, the ALJ noted that Plaintiff testified that she was no longer able to use a
23 cane because she was too heavy. At the time, Plaintiff weighed 190 pounds. (AR
24 70, 72, 116-117, 119, 122.) Yet, the medical records (and the testimony at the
25 hearing) showed that Plaintiff used a cane at the time of her consultative
26 examination in September 2013 when she was heavier, weighing 205 pounds. (AR
27 72, 119-120, 413-415.) The ALJ also noted that despite Plaintiff's protestations that
28 she needed a walker or wheelchair, no physician had ever recommended an

1 assistive device. (AR 72.)

2 Plaintiff argues that her testimony was not inconsistent because she had
3 explained that her ability to use a cane decreased over time. Notwithstanding
4 Plaintiff's assertion, the ALJ's interpretation of the record was both reasonable and
5 supported by substantial evidence. The fact that an alternative interpretation of the
6 record may have been possible does not warrant reversal. *See Orn*, 495 F.3d at 630
7 (where evidence is susceptible of more than one rational interpretation, the
8 Commissioner's decision must be upheld).

9 Plaintiff also contends that the ALJ improperly relied on the absence of a
10 prescription for a walker or wheelchair because new evidence submitted to the
11 Appeals Council showed that Plaintiff was prescribed a walker in September 2016.
12 (Plaintiff's Mem. at 9.) Relying upon *Brewes v. Comm'r of Soc. Sec. Admin.*, 682
13 F.3d 1157 (9th Cir. 2012), Plaintiff argues that the Court must consider the
14 September 2016 prescription in reviewing the ALJ's decision.

15 *Brewes* held that "when a claimant submits evidence for the first time to the
16 Appeals Council, which considers that evidence in denying review of the ALJ's
17 decision, the new evidence is part of the administrative record, which the district
18 court must consider in determining whether the Commissioner's decision is
19 supported by substantial evidence." *Id.* at 1159-1160. The Ninth Circuit's decision
20 was based upon the regulations, which require the Appeals Council to consider new
21 evidence submitted by a claimant, "so long as the evidence relates to the period on
22 or before the ALJ's decision." *Id.* at 1162 (citing 20 C.F.R. § 404.970(b)).
23 Significantly, *Brewes* involved later-submitted evidence that the Appeals Council
24 "made part of the record." *Id.* at 1161.

25 Unlike *Brewes*, the Appeals Council here explicitly declined to consider the
26 September 2016 prescription for a walker, explaining that the evidence was not
27 relevant to Plaintiff's disability at a date prior to the ALJ's March 11, 2016
28 decision. (AR 2.) Further, in identifying the additional evidence which it made part

1 of the record, the Appeals Council did not include the prescription. (AR 6.)
2 Accordingly, the Court rejects Plaintiff's contention that it must consider the
3 prescription as evidence undermining the ALJ's decision. *See Smith v. Berryhill*,
4 2017 WL 993072, at *13 (N.D. Cal. Mar. 15, 2017) (distinguishing *Brewes* and
5 declining to consider evidence that post-dated ALJ's decision to be part of the
6 administrative record where Appeals Council "expressly rejected [that evidence] as
7 falling outside the relevant time period"). In any event, even if this evidence
8 regarding a walker prescription was considered, it would not remove the
9 inconsistencies in Plaintiff's testimony regarding use of a cane.

10 **4. Daily activities**

11 An ALJ may properly rely on a claimant's daily activities to support an
12 adverse credibility determination when those activities are inconsistent with the
13 claimant's alleged symptoms. *See Molina*, 674 F.3d at 1112.

14 Here, Plaintiff reported that her typical day was spent sitting down, "trying to
15 do kitchen work" such as washing dishes, preparing breakfast and dinner for her
16 husband and children, and doing some laundry, although she required assistance
17 moving clothes into the dryer and putting them away. (AR 130-131.) Plaintiff
18 testified that she was able to go to the grocery store and that she went with her
19 husband once a month. (AR 131-132.) In addition, Plaintiff was able to bathe and
20 dress herself. (AR 132.) In her function report, which Plaintiff completed in August
21 2013, Plaintiff stated that her daily activities included a "routine of housework"
22 which she completed "little [by] little," and which included mopping, sweeping,
23 and doing the dishes. (AR 342-343.) By the time of the hearing, however, Plaintiff
24 testified that she was not able to vacuum, dust or sweep. (AR 131.)

25 The ALJ described Plaintiff's daily activities as "sitting down, picking up,
26 washing dishes, preparing breakfast and dinner, doing laundry, putting clothes in
27 the washer and dryer with the help of her husband and son, going shopping once a
28 month, and watching television," and noted that Plaintiff bathed and dressed

1 herself. (AR 70.) The ALJ then concluded that Plaintiff’s “ability to participate in
2 such activities undermined [her] allegations of disabling functional limitations.”
3 (AR 70.) In addition, the ALJ explained:

4 Despite her alleged impairments, the claimant has engaged in a
5 somewhat normal level of daily activity and social interaction as noted
6 above. These daily activities support the residual functional capacity.
7 Moreover, some of the physical and mental abilities and social
8 interactions required in order to perform these activities are the same
9 as those necessary for obtaining and maintaining employment.

10 (AR 70.)

11 The Ninth Circuit has “repeatedly warned that ALJs must be especially
12 cautious in concluding that daily activities are inconsistent with testimony about
13 pain, because impairments that would unquestionably preclude work and all the
14 pressures of a workplace environment will often be consistent with doing more than
15 merely resting in bed all day.” *Garrison v. Colvin*, 759 F.3d 995, 1015-1016 (9th
16 Cir. 2014). Indeed, “the mere fact that a plaintiff has carried on certain daily
17 activities, such as grocery shopping, driving a car, or limited walking for exercise,
18 does not in any way detract from her credibility as to her overall disability.”
19 *Vertigan v. Halter*, 260 F.3d 1044, 1050 (9th Cir. 2001).

20 Here, the ALJ merely referred to Plaintiff’s daily activities and concluded
21 that they were generally inconsistent with Plaintiff’s claimed disability. The ALJ
22 failed to describe how any particular daily activity was inconsistent with any
23 specific claims made by Plaintiff or explain how any daily activity corresponded
24 with obtaining and maintaining employment. This was legally insufficient. *See*
25 *Burrell*, 775 F.3d at 1138 (“the ALJ did not elaborate on *which* daily activities
26 conflicted with *which* part of Claimant’s testimony”); *Lester*, 81 F.3d at 834
27 (“General findings are insufficient; rather, the ALJ must identify what testimony is
28 not credible and what evidence undermines the claimant’s complaints.”).

1 Nevertheless, although the ALJ's lack of specificity renders her reliance
2 upon Plaintiff's daily activities improper, this error is harmless in light of the other
3 sufficiently clear and convincing reasons supporting her credibility determination.
4 *See Bray v. Comm'r of Soc. Sec. Admin.*, 554 F.3d 1219, 1227 (9th Cir. 2009)
5 (where the ALJ presented four other independent proper bases for discounting the
6 plaintiff's testimony, reliance on claimant's continued smoking to discredit her,
7 even if erroneous, amounted to harmless error); *Carmickle v. Comm'r, Soc. Sec.*
8 *Admin.*, 533 F.3d 1155, 1163 (9th Cir. 2008) (ALJ's error in relying on claimant's
9 receipt of unemployment benefits and on relatively conservative pain treatment
10 regime was harmless where ALJ provided other specific and legitimate reasons for
11 finding claimant's testimony incredible); *Batson*, 359 F.3d at 1197 (even if the
12 record did not support one of ALJ's stated reasons for disbelieving claimant's
13 testimony, the error was harmless).

14 * * *

15 In sum, the ALJ did not commit reversible error in making the adverse
16 credibility determination. The ALJ provided clear and convincing reasons for
17 discounting Plaintiff's testimony regarding her subjective complaints, and those
18 reasons are supported by substantial evidence.

19 IT THEREFORE IS ORDERED that Judgment be entered affirming the
20 decision of the Commissioner and dismissing this action with prejudice.

21
22 DATED: 4/16/2018

23
24 
25 ALEXANDER F. MacKINNON
26 UNITED STATES MAGISTRATE JUDGE
27
28